(6) (7)

Nos. 95-345 and 95-346

In the

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

GUY JEROME URSERY,
Respondent.

&

UNITED STATES OF AMERICA,
Petitioner,

v.

FOUR HUNDRED FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.,
Respondent.

On Writ of Certiorari
To the United States Courts of Appeals
For the Ninth and Sixth Circuits

BRIEF OF THE STATE OF CONNECTICUT, 47 STATES, AND THE COMMONWEALTH OF PUERTO RICO AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

The amici states seek reversal of the decisions in the consolidated cases granted review. Those cases misinterpreted *United States v. Halper*, 490 U.S. 435 (1989); *Austin v. United States*, 113 S. Ct. 2801 (1993); and *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994), and thereby wrongfully expanded the Double Jeopardy Clause. Analysis similar to that employed by the Ninth and Sixth Circuits has already caused a deluge of double jeopardy litigation in far-reaching areas of traditional state criminal and civil regulation. This Court's decision will directly affect the states' ability to enforce their laws and avoid disruption to the orderly business of criminal and civil adjudication in such varying areas as unemployment compensation, drivers licensing, prison discipline and prosecutions of all types of criminal offenses.

Moreover, although the decisions below construed the federal civil forfeiture statute, 21 U.S.C. § 881 (1994), every state has a civil forfeiture statute, many patterned after § 881.[1] Even states with statutory forfeiture patterns unlike the federal statute[2] have faced or will face double jeopardy challenges based on the decisions below. The states use civil forfeiture as an essential instrument in their efforts to remedy the consequences of criminal conduct which risks or

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[1] *E.g.*, *In re One 1987 Toyota*, 621 A.2d 796, 798 (Del. Super. Ct. 1992) (Delaware statute "modeled closely upon" § 881); *Idaho Dept. of Law Enforcement By and Through Cade v. Real Property Located in Minidoka County*, 885 P.2d 381, 383 (Idaho 1994) (Idaho statute "virtually identical to" § 881).

[2] *E.g.*, Ariz. Rev. Stat. Ann. §§ 13-4301 to 13-4315 (Supp. 1994); Kan. Stat. Ann. §§ 65-4135 to 65-4175 (1992). *See also* Commission Reform Act of 1994, drafted by the President's Commission on Model State Drug Laws.

harms the public health or safety. Forfeiture has proven its effectiveness in disrupting criminal enterprises, removing essential materiel, preventing capitalization of illegal business and limiting the economic power and personal enjoyment derived from illegal proceeds. The decisions of the courts below would severely limit the ability of the states to use that vital tool.

SUMMARY OF ARGUMENT

1. The Ninth and Sixth Circuits misapplied and expanded this Court's double jeopardy jurisprudence. Relying on dictum in *United States v. Halper*, 490 U.S. 435 (1989), the courts below held that a civil sanction which is not solely remedial cannot be imposed in addition to a criminal punishment. Such an interpretation conflicts both with the actual holding of *Halper* and with the later decision in *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 2801 (1993). Those cases held that civil sanctions which cannot "fairly be characterized as remedial, but *only* as a deterrent or retribution," are "punishment" for double jeopardy purposes. *Halper*, 490 U.S. at 448-449 (emphasis added); *Kurth Ranch*, 114 S. Ct. at 1952. Thus, the Ninth and Sixth Circuits turned the inquiry on its head. Those courts based their decisions on *Austin v. United States*, 113 S. Ct. 2801 (1993), which was not a double jeopardy case but instead addressed whether a federal civil forfeiture statute can be deemed punishment so as to come within the term "fine" in the Eighth Amendment's Excessive Fines Clause.

The Ninth and Sixth Circuits also erred by failing to assess the nature of the sanction and its remedial goals. This Court in *Halper* and *Kurth Ranch* clearly stated that double

jeopardy analysis requires a "particularized assessment" of each sanction and its purposes. *Halper*, 490 U.S. at 448; *Kurth Ranch*, 114 S. Ct. at 1948. The courts below ignored that requirement, holding that all forfeitures are punishment for purposes of double jeopardy and therefore invalidating the entire proceeding.

2. Litigants and courts applying the improper analysis employed by the Ninth and Sixth Circuits have produced a flood of double jeopardy litigation in state courts. Civil claimants and criminal defendants have challenged penalties and sanctions in areas in which states have traditionally exercised legitimate regulatory power, including drivers licensing, professional licensing, business regulation and prosecutions of crime. These claims are crippling the ability of the states to pursue civil and criminal justice in a timely and orderly manner. Affirmation of the decisions below would continue this disruption of states' administration of their civil and criminal laws and destroy many state regulatory programs.

3. With respect to forfeiture specifically, under a correct application of *Halper* and *Kurth Ranch*'s double jeopardy jurisprudence, forfeiture of the proceeds of a crime is always remedial and therefore outside the Double Jeopardy Clause. Such forfeiture merely removes illegal profits to which the possessor has no lawful property right and prevents use of illegally gained assets to expand criminal activity. Forfeiture of assets which facilitate crimes is similarly remedial because it disrupts drug trafficking by taking away the tools that a drug trafficker needs to ply his trade.

4. Finally, although the decisions below can be reversed in accord with the actual holding of *Halper*, if this Court concludes that the Ninth and Sixth Circuits correctly interpreted *Halper*, the amici states believe that *Halper* should be reconsidered and overruled. Applying the Double Jeopardy Clause as the courts below did does not further the Clause's aims, and would continue to create judicial confusion over many difficult issues, resulting in unfair and inconsistent results and vexatious litigation.

ARGUMENT

IMPOSITION OF BOTH CIVIL FORFEITURE, OR OTHER CIVIL SANCTIONS, AND A CRIMINAL CONVICTION AND SENTENCE DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Double Jeopardy Clause has been held to prohibit "three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. at 440. Until *Halper*, it was generally understood that the Double Jeopardy Clause applied only to criminal prosecutions or those few proceedings labeled civil, but deemed to be in fact criminal and thus to require the constitutional safeguards provided to criminal defendants. *See Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) (risk to which the Clause refers is not present in proceedings that are not essentially criminal); *Breed v. Jones*, 421 U.S. 519, 528 (1975) ("In the

constitutional sense jeopardy describes the risk that is traditionally associated with a criminal prosecution."); *United States v. Ward*, 448 U.S. 242 (1980); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Thus, there was a fairly clear distinction between criminal and civil penalties. Criminal penalties were those which resulted from criminal or "criminal-like" proceedings. *See* Linda S. Eads, *Separating Crime from Punishment, The Constitutional Implications of United States v. Halper*, 68 Wash. U. L.Q. 929 (1990).

In *Halper*, this Court departed from that understanding of double jeopardy jurisprudence and held that a sanction imposed in a civil proceeding could be deemed punishment for purposes of double jeopardy. The Court held that some civil sanctions, or portions thereof, serve only deterrent or retributive purposes because they are not rationally related to remedying the government's damages. Relying solely on the multiple punishment prong of double jeopardy analysis, the Court then determined that in certain very limited situations such sanctions are punishment for double jeopardy purposes and cannot stand after the imposition of a criminal punishment. *Halper*, 490 U.S. at 449. However, the court stated that both such punishments could be imposed in a single proceeding. *Halper*, 490 U.S. at 450.

The courts below misapplied *Halper* and two subsequent cases: *Austin v. United States*, 113 S. Ct. 2801 (1993), an Eighth Amendment case; and *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994). Because other litigants have adopted their analysis, states have been inundated with meritless double jeopardy claims. This has

wrongfully threatened enforcement of an array of civil sanctions including the civil forfeiture sanction. This Court should reaffirm that civil sanctions implicate the Double Jeopardy Clause in only the rarest of proceedings.

A. The Sixth and Ninth Circuits Misapplied and Expanded The Double Jeopardy Doctrine of *Halper* and *Kurth Ranch*.

The two Courts of Appeal below misconstrued the double jeopardy jurisprudence enunciated in *Halper*, and expanded it beyond the bounds previously delineated in at least three crucial ways.

First, the courts below unduly expanded the concept of "punishment" for a double jeopardy assessment of civil sanctions. They did so by relying on *dictum* in *Halper* and ignoring its actual holding. Both courts held that a sanction which has any deterrent or retributive purpose or effect, regardless of its overall remedial goals, must be considered punishment. The courts relied on the following dictum in *Halper*: "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Halper*, 490 U.S. at 448.

The actual holding of *Halper*, however, was to a very different effect:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction *may not fairly be characterized as remedial, but only as a deterrent or retribution.*

490 U.S. at 448-449 (emphasis added). Thus a civil sanction implicates double jeopardy if it can "only" be characterized as a deterrent or retribution and has no remedial function.[3]

Instead of following this clear teaching from the double jeopardy cases, the Ninth and Sixth Circuits relied on the use of the "solely remedial" language in *United States v. Austin*, 113 S. Ct. at 2812. However, *Austin* involved a different constitutional provision from *Halper* and accordingly used a different analysis. *Austin's* excessive fines analysis characterized all forfeitures, including purely remedial ones, as punishment for purposes of the term "fine" in the Excessive Fines Clause. 113 S. Ct. at 2812 n. 14. Moreover, that was only a threshold determination, and a remand was necessary to determine if the fine was excessive. *Halper*, by contrast, did not characterize remedial sanctions as punishment, and its determination that a sanction was punishment decided the ultimate issue and invoked the

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[3] In *Kurth Ranch*, this court reiterated the *Halper* holding, with no reference to the "solely remedial" dictum. 114 S. Ct. at 1945. *See also Kurth Ranch*, 114 S.Ct. at 1952 (Rehnquist, C.J., dissenting) (proper inquiry is whether a sanction "can *only* be explained as serving a punitive purpose.") (emphasis added); *Id.* at 1953 (O'Connor, J., dissenting) ("Our double jeopardy cases make clear that a civil sanction will be considered punishment to the extent that it serves *only the purposes of retribution and deterrence, as opposed to furthering any nonpunitive objective.*") (emphasis added).

Double Jeopardy Clause. Thus, *Austin* cannot support the lower courts' expansion of the double jeopardy doctrine.

Second, the two circuit courts ignored *Halper*'s direction to undertake, for double jeopardy analysis, a "particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *Halper*, 490 U.S. at 448. *See also Kurth Ranch*, 114 S. Ct. at 1948 (specific analysis that applies to determine whether a sanction is punishment for a double jeopardy claim varies depending on the sanction under consideration). Such a "rule . . . of reason" permits application of double jeopardy principles only in the "rare case" where the civil penalty in application bears no rational relation to a remedial goal so that it "*in fact* constitutes a second punishment." *Halper*, 490 U.S. at 446, 449-50.

Rather than following this mandate, and determining the nature of the remedial goals of the forfeiture sanction, the courts below relied on the Eighth Amendment analysis of *Austin* to hold that all forfeitures are punishment. That reliance was unfounded. *Austin* did not change the *Halper* rule by adopting a categorical approach to the concept of punishment for forfeiture or any other sanction. In fact, *Austin* acknowledged the individual nature of the *Halper* double jeopardy inquiry. *Austin*, 113 S. Ct. at 2812 n.14. It is true that in addressing the Eighth Amendment definition of the term "fine," *Austin* focused on the federal civil forfeiture statute as a whole. However, that inquiry was only the first step in the Eighth Amendment analysis, and the Court remanded the case for a determination of whether the particular forfeiture at issue was remedial or non-remedial and therefore "excessive." *Id.*, 113 S. Ct. at 2812 n.14.

Had the court intended the categorical approach to forfeitures used by the Ninth and Sixth Circuits, there would have been no need for a remand.

Third, the courts below erred in dismissing the second sanction rather than amending the civil sanction to comply with double punishment limitations set out in *Halper*. Blanket dismissal leads to the anomalous circumstance that an entire remedy is negated if it is a single dollar over the level at which a remedial sanction becomes punitive. Such a result conflicts with *Halper*'s directive to assess so much of the potential civil judgment as is not punitive, after a particularized view of the remedial goals of the civil action involved and the circumstances of the specific case.

In sum, contrary to the decisions below, punishment occurs only in the "rare case" where there is an egregiously excessive civil sanction that is not reasonably related to a remedial purpose. Even then, the entire sanction need not necessarily be barred. Only that portion which is unrelated to the remedial goals may be considered punishment.[4]

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[4] The Ninth Circuit also mistakenly held that coordinated, parallel civil and criminal proceedings could never be considered the same proceeding so as to comply with *Halper*'s teaching that there is no double jeopardy violation if the civil and criminal sanctions, no matter their extent, are applied in the same proceeding. The Sixth Circuit did not adopt a categorical rule, but mistakenly determined that in the case before it there was insufficient evidence of coordination of actions to find one proceeding. Neither court used the correct analysis. Parallel civil and criminal proceedings for the same conduct may be deemed one proceeding for double jeopardy purposes so long as the timing of the actions does not permit repeated attempts to achieve in a second action what the government did not accomplish in the first. This kind of oppressive abuse by an initially dissatisfied government is at the heart of

B. The Double Jeopardy Analysis Employed In The Decisions Below Has Created Havoc With The States' Efforts To Perform Their Traditional Role In The Prosecution Of Crime And The Regulation Of Civil Activity.

Reasoning similar to that of the Ninth and Sixth Circuits has produced novel and vexatious double jeopardy litigation in state courts across the nation. In order legitimately to address prohibited conduct, the states increasingly rely on civil sanctions such as taxes, forfeitures, drivers license suspensions, professional disciplinary sanctions and exclusion from participation in public programs. Many of these civil sanctions are imposed for conduct that is also subject to criminal prosecution and punishment. However, double jeopardy analysis such as that used by the Ninth and Sixth Circuits casts into doubt the authority of the states to apply civil sanctions in addition to

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the double jeopardy concern. Absent that potential, there is only one jeopardy. *See United States v. Millan*, 2 F.3d 17 (2d Cir. 1993), *cert. denied, sub nom., Bottone v. United States*, 114 S. Ct. 922 (1994); *United States v. One Single Family Residence Located at 18755 North Bay Road, Miami*, 13 F.3d 1493 (11th Cir. 1994). The amici, however, will leave to the United States to argue the facts of the particular proceedings involved here.

In addition, the Sixth Circuit also erred in finding that the forfeitures and the criminal convictions were based on different offenses under the traditional double jeopardy test of *Blockburger v. United States*, 284 U.S. 299 (1932), which requires a determination of whether each "offense" requires proof of an element not included in the other. *See also United States v. Dixon*, 113 S. Ct. 2849 (1993). Because that determination is necessarily based on the specific statutory elements involved in a particular case, the amici states will not argue that issue here, but support the United States in its argument.

criminal prosecution. Furthermore, that kind of double jeopardy reasoning has disrupted the orderly process of criminal justice by leading either to dismissals of criminal charges following a civil sanction or to interlocutory appeals of the denial of those dismissals, regardless of the facial frivolity of the claim.

The states have faced challenges to criminal prosecutions and civil sanctions in cases ranging from homicide to sexual assaults to disqualification from public office to professional discipline. For example, most, if not all, states have faced challenges to the criminal prosecution of drunk driving charges because of prior drivers license suspensions for the same conduct. In Connecticut, a trial court dismissed such a prosecution based on its reading of the *Halper* line of cases. Analyzing the double jeopardy issue much as the Ninth and Sixth Circuits did here, the trial court held that drivers license suspension could not be deemed "solely" remedial and therefore constituted "punishment," barring a criminal punishment for the same conduct. *State v. Hickam*, No. MV94 618025, 1995 Conn. Super. LEXIS 1215 (Apr. 20, 1995), *rev'd*, No. 15256, 1995 Conn. LEXIS 432 (Dec. 26, 1995). The Connecticut Supreme Court, analyzing the issue differently, held the license suspension remedial rather than punitive and reinstated the prosecution. *State v. Hickam*, No. 15256, 1995 Conn. LEXIS 432 (Dec. 26, 1995). By contrast, an Ohio Court of Appeals agreed with a defendant's double jeopardy reasoning and refused to reinstate the drunk driving

prosecution. *State v. Gustafson*, No. 94 C.A. 232, 1995 Ohio App. LEXIS 2790 (Jan. 27, 1995).[5]

Some state trial courts have dismissed criminal prosecutions after imposition of a civil sanction. *See, e.g., State v. Hickam*, 1995 Conn. Super. LEXIS 1215; *State v. Hanson*, Nos. C1-95-531, C5-95-564, 1996 Minn. LEXIS 8 (Jan. 19, 1996) (reversing trial court); *Small v. Commonwealth*, 402 S.E.2d 927 (Va. Ct. App. 1991) (en banc); *State v. Schnittgen*, No. 95-384 (Mont. filed Aug. 21, 1995) (appeal pending from district court's dismissal of felony charges, holding prior termination of the defendant's employment as deputy sheriff was punishment for double

[5] The *Gustafson* case is currently on appeal to the Ohio Supreme Court. *See Gustafson*, 73 Ohio St. 3d 1427 (Ohio 1995). A different Ohio appellate court came to a contrary conclusion and reinstated the prosecution. *State v. Miller*, No. 2-94-32, 1995 Ohio App. LEXIS 1971 (May 12, 1995), *appeal allowed*, 655 N.E.2d 185 (Ohio 1995).

For other challenges to drunk driving prosecutions following suspension of license, *see, e.g., State v. Zerkel*, 900 P.2d 744 (Alaska Ct. App. 1995); *State v. Nichols*, 819 P.2d 995 (Ariz. Ct. App. 1991); *Freeman v. State*, 611 So. 2d 1260 (Fla. Dist. Ct. App. 1992), *cert. denied*, 114 S. Ct. 415 (1993); *State v. Higa*, 897 P.2d 928 (Haw. 1995); *State v. Maze*, 825 P.2d 1169 (Kan. Ct. App. 1992); *Butler v. Department of Pub. Safety & Corrections*, 609 So. 2d 790 (La. 1992); *State v. Jones*, 666 A.2d 128 (Md. 1995), *petition for cert. filed*, 64 U.S.L.W. 3510 (U.S. Jan. 11, 1996) (No. 95-1131); *State v. Savard*, 659 A.2d 1265 (Me. 1995); *State v. Hanson*, Nos. C1-95-531, C5-95-564, 1996 Minn. LEXIS 8 (Jan. 19, 1996); *State v. Young*, 530 N.W.2d 269 (Neb. Ct. App. 1995); *State v. Cassady*, 662 A.2d 955 (N.H. 1995); *State v. Tench*, 462 S.E.2d 922 (Va. Ct. App. 1995); *State v. Strong*, 605 A.2d 510 (Vt. 1992).

jeopardy purposes).[6] In other cases, courts have invalidated a civil sanction following a criminal conviction for the same conduct. *See, e.g., Kvitka v. Board of Registration in Medicine*, 551 N.E.2d 915 (Mass.), *cert. denied*, 498 U.S. 823 (1990) (vacating fine imposed by medical licensing board following criminal conviction for illegal drug dispensing).

Thus, the reach of the double jeopardy analysis, as expanded in the two cases granted review, extends far beyond the civil forfeiture arena. No sooner do state attorneys believe they have seen the most extensive and frivolous permutation of these double jeopardy claims than imaginative civil claimants and criminal defendants present new challenges. The spectrum includes: claims that professional disciplinary actions bar criminal prosecution and vice versa;[7] claim that conviction for unregistered firearms bars revocation of state liquor license for same conduct;[8] claims that prison discipline for violent conduct bars

[6] *Halper* involved a civil penalty imposed after a criminal prosecution. In *Kurth Ranch* this Court noted that it was not deciding the case in which the criminal prosecution follows the civil sanction. *Kurth Ranch*, 114 S.Ct. at 1947 n.21.

[7] *Schillerstrom v. State*, 885 P.2d 156 (Ariz. Ct. App. 1994), *cert. denied*, No. CV-94-0396-PR (Ariz. Dec. 20, 1994) (revocation of chiropractic license); *People v. Marmon*, 903 P.2d 651 (Colo. 1995) (attorney discipline); *Loui v. Board of Medical Examiners*, 889 P.2d 705 (Haw. 1995) (discipline of medical doctor).

[8] *Roach Enters., Inc. v. License Appeal Comm'n*, Nos. 1-95-1446, 1-95-1555, 1996 Ill. App. LEXIS 9 (Jan. 12, 1996).

subsequent prosecution for assault or homicide;[9] challenge to revocation of business license to operate heath spa following plea of nolo contendere to sexual ofense;[10] challenge to negligent homicide prosecution after ine for traffic violation resulting in death;[11] claims tha prior criminal conviction precludes application of statutory or state constitutional bar on candidacy for public office;[12] claims that disqualification from public benefits because of ciminal conduct bars subsequent criminal prosecution;[13] clains that school expulsion for criminal misconduct bars delinquency adjudication;[14] challenge to motor vehicle department assessment of "points" on driving record after convicion for

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[9] *State v. Walker*, 646 A.2d 209 (Conn. App. Ct.), *appeal denied*, 648 A.2d 159 (Conn. 1994); *State v. McKenzie*, No. C3-95-128, 1996 Minn. LEXIS 10 (Jan. 19, 1996).

[10] *Moser v. Richmond County Bd. of Comm'rs*, 428 S.E.2d 71 (Ga. 1993).

[11] *Purcell v. United States*, 594 A.2d 527 (D.C. 1991).

[12] *McIntyre v. Miller*, 436 S.E.2d 2 (Ga. 1993); *Taylor v. State Election Bd.*, 616 N.E.2d 380 (Ind. Ct. App. 1993).

[13] *State v. Varney*, No. CA94-12-013, 1995 Ohio App. LEXIS 2822 (July 3, 1995); *State v. Millett*, No. And-95-166, 1996 Me. LEXIS 7 (Jan. 5, 1996); *State v. Duerr*, No. 14871, (Conn. App. Ct. filed December 29, 1995).

[14] *In re Dandridge*, 614 So.2d 129 (La. Ct. App.), *cert. denied*, 616 So. 2d 684 (La. 1993); *In re Gila County Juvenile Delinquency Action*, 816 P.2d 950 (Ariz. Ct. App. 1991).

motor vehicle offenses;[15] and claim that denial of accrued vacation benefits after public employment termination due to crime violates double jeopardy because of previous conviction for the crime.[16]

The doctrine that civil sanctions can be deemed punishment for double jeopardy purposes has even led to claims in cases involving only civil adjudication. In *Ward v. Department of Pub. Safety and Correctional Servs.*, 663 A.2d 66 (Md. 1995), an employee was disciplined for misconduct at his job. Subsequently, he was discharged. He claimed, pursuant to *Halper* and its progeny, that the prior suspension was a form of punishment which constituted an "administrative" double jeopardy bar to the subsequent discharge.[17]

Even more surprising, the *Halper* doctrine has been invoked in private lawsuits. Defendants previously convicted of crimes have claimed that in private lawsuits for damages caused by the criminal conduct, punitive damages are barred under double jeopardy rules. *See Whittaker v. Dail*, 567 N.E.2d 816 (Ind. Ct. App. 1991), *rev'd on other grounds*, 584 N.E.2d 1084 (Ind. 1992); *Jines v. Seiber*, 549 N.E.2d 964 (Ill. App. Ct. 1990). In Oregon, a trial court dismissed

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[15] *No Illegal Points, Citizens for Drivers Rights, Inc. v. Florio*, 624 A.2d 981 (N.J. Super. Ct. App. Div.), *cert. denied*, 634 A.2d 526 (N.J. 1993).

[16] *Stuart v. Department of Social and Rehabilitation Servs.*, 846 P.2d 965 (Mont. 1993).

[17] At oral argument in the appeal, the claimant abandoned the constitution as a basis for his claim. Nevertheless the court explained why his claim was meritless. *Ward*, 663 A.2d at 69.

a prosecution for shoplifting because the defendant had already been "punished" by paying restitution to the store owner in a civil suit. *State v. Reetz*, No. CA A89387 (Ore. Ct. App. filed July 24, 1995).

Finally, at least one court has extended the distorted, expansive reading of *Halper* to employ the double jeopardy analysis even where there was no prior punishment, but the claimant had been subjected to a prior proceeding. Thus, in *Crump v. Alabama Alcoholic Beverage Control Bd.*, No. 2940412, 1995 Ala. Civ. App. LEXIS 670 (Dec. 1, 1995), the court found that a civil fine was an additional penalty barred by the double jeopardy clause even though the plaintiff had previously been acquitted of the crime and therefore not punished previously.

The cases cited above are only the tip of the iceberg. In a decision filed in January, 1995, the New York Supreme Court of Kings County reported that a computer search indicated that at least 147 state decisions had discussed or cited the *Halper* rule. *District Attorney of Kings County v. Iadarola*, 623 N.Y.S.2d 999 (N.Y. Sup. Ct. 1995). These challenges to states' civil and criminal proceedings are increasing at an alarming rate.[18] The doctrine described by this Court in *Halper*, 490 U.S. at 449, as only for the "rare case" has become the claim for the ordinary case.

Most of these challenges, even when accepted at the trial level, have been rejected by state appellate courts. For

[18] Another source of potentially crippling litigation is habeas corpus claims of state prisoners in both state and federal courts seeking to vacate criminal convictions due to prior civil sanctions.

the most part, the states have avoided a categorical approach to the question of civil sanctions, instead considering the particular sanction involved and restricting a finding of double jeopardy to the "rare case." Moreover, the state courts have looked to see if a civil sanction may "fairly be characterized as remedial" rather than finding punishment whenever there is any deterrent or retributive effect or goal.[19] Nevertheless, the temporal and monetary resources devoted to defending the state's authority to pursue its legitimate civil and criminal goals has been crippling. Many states allow an interlocutory appeal when a claim of double

[19] *See, e.g., People v. Dworak*, 658 N.E.2d 869 (Ill. App. Ct. 1995) (upholding denial of motion to dismiss DUI prosecution, and stating:

> We do not read the Supreme Court cases as requiring an inflexible test which automatically classifies a sanction as punishment unless it can fairly be said *solely* to serve a remedial purpose. . . The Court [in *Kurth Ranch*] clearly recognized that civil sanctions may have some incidental deterrent or punitive effect without necessarily being 'punishment' for double jeopardy purposes. Although the *Halper* Court at one point employed somewhat expansive language ('fairly said solely to serve a remedial purpose'). . .that language does not comprise the holding or the test established in *Halper* and in subsequent cases. . . . *Id.* at 874) (emphasis in original);

See also State v. Tench, 462 S.E.2d 922, 924 n.4 (Va. Ct. App. 1995) ("This is not the 'rare case' described by *Halper*. The sanction here is not monetary and is not designed to compensate the government for out-of-pocket losses. Its remedial purpose is not to compensate, but to protect the public from intoxicated drivers and the accidents they cause.").

jeopardy is asserted to bar a criminal prosecution.[20] Thus, the orderly process of justice is delayed even when the double jeopardy claims are ultimately rejected.

If the Court affirms the courts below, this drain on state judicial resources would multiply dramatically. It would be virtually impossible to find any civil sanction "solely" remedial, as all such sanctions have some deterrent or retributive effect or goal. The violent prisoner would escape prosecution for his crimes based on the same erroneous analysis that caused the Ninth and Sixth Circuits to bar both forfeiture and prosecution. Instead, double jeopardy principles should return to the intent of this Court's decision in *Halper* and be applied extremely narrowly in the civil sanction area. This Court's decision must be carefully crafted to avoid disastrous and unintended results to the states' authorized civil sanctioning power.

C. Contrary To The Decisions Below, Under This Court's Double Jeopardy Doctrine as Enunciated in *Halper* and *Kurth Ranch*, Forfeitures Are Punishment Only In The "Rare Case."

Part B, *supra*, demonstrates how an erroneously expansive reading of *Halper* is having a deleterious effect on an array of civil sanctions. The most immediate negative effect of the decisions of the courts below is on the forfeiture

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[20] *See, e.g., State v. Davis*, 903 P.2d 940 (Utah Ct. App. 1995) (interlocutory appeal from denial of motion to dismiss criminal prosecution following forfeiture of vehicle); *State v. Aparo*, 614 A.2d 401, 403 n.4 (Conn. 1992), *cert. denied*, 507 U.S. 972 (1993) (double jeopardy claim exception to final judgment rule for appellate review, citing *Abney v. United States*, 431 U.S. 651 (1977)).

sanction. The courts below held that civil forfeitures, categorically, are "punishment" for purposes of applying the Double Jeopardy Clause. This directly conflicts with *Halper*'s holding that civil sanctions are "punishment" only in the rare case. Moreover, this court in *Austin* recognized that some types of forfeiture are remedial and thus fall outside the Double Jeopardy Clause.

The courts below also neglected to assess the particular remedial purposes of forfeiture actions. The fine in *Halper* was intended to compensate the government for its direct losses and expenses incurred as a result of the false claims filed by Halper and the ensuing litigation. In the case of forfeiture, there are costs to society resulting from illegal drug marketing that are not assessable in financial terms, but are nonetheless real.[21] And the remedial goal is to remove the harmful assets from society to prevent future damage. Moreover, the illegal narcotics industry is an entire underground economy in which no one acts alone. Every

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[21] Many states, recognizing the nature of these costs, have statutorily allocated the proceeds of civil forfeiture actions to remedial compensatory goals such as funding drug law enforcement, drug abuse education and gang prevention programs. *See, e.g.*, Conn. Gen. Stat. § 54-36i(c) (1994) (allocating forfeiture of drug assets to fund of which 70% goes to local and state police for drug education and detection and investigation of drug crime and gang violence, 20% to the department of health for substance abuse treatment and education, and 10% for the prosecution of drug related crimes by the division of criminal justice); Or. Rev. Stat. tit. 16, ch. 166, § 10(1)(c) (1993) (allocating funds to enforcement of drug laws, drug intervention, treatment and education programs and prohibiting use for construction, expansion or maintenance of buildings and employment positions previously funded out of non-forfeiture proceeds); Ariz. Rev. Stat. Ann. §§ 13-4311(I),(N) (1995) (allocating forfeiture proceeds as a first priority to compensate the victim of the crime with which the property was associated).

participant is tied to others in the enterprise. The costs of investigating and prosecuting an individual defendant will inevitably include costs attributable to investigation and prosecution of many others as well. Therefore, it is fair to view broadly the costs of the drug business in assessing the remedial nature of civil forfeiture.

1. Forfeiture of proceeds of a crime is always remedial.

In *Austin*, the Court recognized that forfeiture of contraband is remedial. The Court cited *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), where contraband was forfeited, as an example of cases where the forfeiture could properly be "characterized as remedial because it removes dangerous or illegal items from society." *Austin*, 113 S. Ct at 2811. Proceeds of criminal activity, often of illegal narcotics trafficking, are the functional equivalent of the contraband they replace. Forfeiture of criminal proceeds serves to remove the illegally obtained assets from society and to prevent their reinvestment in the expansion of harmful, illegal activity. Thus, forfeiture of proceeds is remedial under *Austin*, because it does in fact remove dangerous items from society. *Id.* at 2811.[22]

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[22] In general, this Court has upheld against double jeopardy challenges the imposition of criminal punishment and the *in rem* forfeiture of property associated with the crime. *See One Lot of Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931); *But see Coffey v. United States*, 116 U.S. 436 (1886) (striking down forfeiture following acquittal of crime on grounds difficult to determine but appearing to be collateral estoppel principles, with no specific mention of the Double Jeopardy Clause). *Coffey* was disapproved in

Furthermore, forfeiture of proceeds, like that of contraband, takes property to which the possessor has no lawful right. In *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), this Court upheld the forfeiture of proceeds of drug trafficking intended to pay for a criminal defendant's legal fees. The Court reasoned that the money was not rightfully the defendant's, and, therefore, forfeiture did not violate his Sixth Amendment right to counsel of his choice.[23] *Cf. Rex Trailer Co. v. United States*, 350 U.S. 148, 153-54, n.6 (1956) (illegal proceeds from fraudulent transaction with the government characterized as "unjust enrichment"). Similarly, the forfeiture of assets which do not legally belong to the possessor is not punishment. It merely places the offender back in the position he enjoyed prior to his criminal activities. Moreover, the forfeiture of drug proceeds will always be proportional to the amount of drugs sold, and therefore proportional also to the harm to society. *United States v. Tilley*, 18 F.3d 295 (5th Cir.), *cert. denied*, 115 S. Ct. 574 (1994).

Although the Ninth Circuit failed to understand the remedial nature of proceeds forfeiture, the same mistake was not made by other circuit courts and many state courts. *See, e.g., United States v. Tilley*, 18 F.3d 295; *United States v. $184,505.01 in United States Currency*, 72 F.3d 1160 (3d Cir. 1995); *United States v. Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994) (proceeds forfeiture not punishment for

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United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984).

[23] The proceeds of criminal activity are analogous to the money taken in a bank robbery. *Caplin & Drysdale*, 491 U.S. at 626. It would be absurd to find that forfeiture of the proceeds of bank robbery bars a criminal prosecution or vice versa.

purposes of the Eighth Amendment Excessive Fines Clause); *District Attorney of Kings County v. Iadarola*, 623 N.Y.S.2d 999 (N.Y. Sup. Ct. 1995); *Idaho Dep't. of Law Enforcement By and Through Cade v. Real Property Located in Minidoka County*, 885 P.2d 381, 383 n.5 (Idaho 1994). Those courts correctly held that forfeiture of proceeds is not punishment. As the Fifth Circuit stated:

> When . . . . the property taken by the government was not derived from lawful activities, the forfeiting party loses nothing to which the law ever entitled him. . . . The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, continued possession of such proceeds because they have their very genesis in illegal activity.

Tilley, 18 F.3d at 300. *See also SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (ordering a previously convicted defendant to disgorge profits of illegal securities activities not punishment for double jeopardy purposes). *But see United States v. 9844 South Titan Ct., Unit 9, Littleton, Colo.*, Nos. 94-1285, 94-1290, 1996 U.S. App. LEXIS 1559 (10th Cir. Feb. 5, 1996) (agreeing with the Ninth Circuit's holding that forfeiture of proceeds is punishment for double jeopardy purposes).

2. The forfeiture of property which facilitates criminal activity is also remedial.

Forfeiture of criminal instrumentalities protects the public from continued crime by diminishing its profits and providing obstacles to its pursuit. For example, when a drug dealer's car is forfeited, he has to find other transportation. Walking or using public transit makes transporting drugs less flexible, more time-consuming and less secure. Without the property necessary to conduct his business, including buildings and conveyances, the manufacturer or distributor of illegal drugs will have difficulty remaining in business and society will be spared the harm inflicted by this crime. The remedial purpose is not to compensate the government for its litigation costs as was the case for the fine in *Halper*; rather, forfeiture of instrumentalities serves the remedial purpose of removing the tools of the drug dealer's trade. *United States v. Cullen*, 979 F.2d 992, 994 (4th Cir. 1992); *State v. Rosenfeld*, 540 N.W.2d 915, 921 (Minn. Ct. App. 1995); *See also One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 237 (1972) (non-contraband property forfeitable as instruments of a customs offense, and analyzed as liquidated damages).

This is true irrespective of the value of the forfeited facilitating property. Considering that value as an indication of disproportionality and punishment, as was suggested in *Austin*, is illogical in the double jeopardy assessment. To do so would reward those drug merchants who are successful, and have thus created enormous harm to society, by barring under double jeopardy doctrine a criminal prosecution. On the other hand, small-time or unsuccessful drug dealers who have not managed to amass wealth would be subject to both

forfeiture and prosecution. That distinction makes no sense. *See Cullen*, 979 F.2d at 995 ("So far as the public welfare is concerned, the Ferrarri is at least as harmful an instrumentality as the Chevette"). Rather, it is the nexus between the property and the crime which is the appropriate consideration. *Austin*, 113 S. Ct. at 2815 (Scalia, J., concurring in part, concurring in the judgment). If property is sufficiently involved in crime, its removal from that use is remedial.

D. This Court Should Reconsider *Halper*'s Double Jeopardy Application To Civil Sanctions.

As discussed, the two cases on review can be reversed in accord with the actual holdings of *Halper* and *Kurth Ranch*. However, if this Court concludes that the Ninth and Sixth Circuits correctly interpreted the *Halper* doctrine, the amici states believe that that doctrine should be reconsidered and overruled. Such an expanded view of double jeopardy does not comport with the constitutional purposes of the provision. And that expanded analysis, if adopted by this Court, would continue to engender overwhelming litigation in state courts and crippling obstacles to state administration of civil and criminal justice.

The core concern of the Double Jeopardy Clause is the finality of criminal judgments and the prevention of abusive repeated prosecutions for the same offense. *Crist v. Bretz*, 437 U.S. 28, 33, 35 (1978); *Mitchell*, 303 U.S. at

399; *Breed*, 421 U.S. at 528.[24] The multiple punishment prong, at least in the context of a single trial, does no more than ensure that any punishment imposed does not exceed that authorized by the legislature. *Missouri v. Hunter*, 459 U.S. 359, 368-369 (1983). Those concerns are not furthered by the expanded *Halper* analysis employed by the Ninth and Sixth Circuits. By rejecting the legislatively authorized cumulative civil and criminal penalties for certain misconduct, that doctrine actually conflicts with that strain of prior double jeopardy jurisprudence. In fact, it creates an unwarranted shift in the balance of power between the legislative and judicial branches by substituting the trial court's judgment for the legislature's as to the appropriate sanction for misconduct.

Although addressing only the multiple punishment prong, *Halper*, when read as the Sixth and Ninth Circuits did, in fact creates a concept of "successive punishments" applied to civil actions. That concept does not address potential abuse of the criminal process through successive

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[24] Prior to *Halper*, it had been well settled that a legislature "may impose both a criminal and a civil sanction in respect to the same act or omission" without violating the Double Jeopardy Clause. *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). Before *Halper*, therefore, the Court had considered a civil sanction in the context of determining if a statutory scheme was in fact a criminal proceeding requiring all of the constitutional protections accorded criminal defendants, despite a legislative label indicating it was intended to be a civil proceeding. The determination was done through statutory construction, and deference was paid to the legislature's denomination. Only the clearest proof that the purpose and effect of the sanction were punitive would suffice to override the legislature's manifest preference for a civil penalty. *United States v. Ward*, 448 U.S. 242, 249 (1980).

trials. The *Halper* decision does not bar a civil action following a criminal prosecution; it merely bars any portion of a civil penalty imposed that is deemed greater than that which would be remedial. Thus, the Court did not preclude a second trial, nor did it require the civil action to provide the constitutional safeguards of the Sixth Amendment and other provisions relating to criminal defendants. It is evident therefore that the Court was not furthering the successive prosecution concern of the Double Jeopardy Clause.[25]

The amici states therefore urge this Court to end the confusion in Double Jeopardy jurisprudence created by lower courts' attempts to deal with the aftermath of *Halper* and *Kurth Ranch*. The principles enunciated in prior cases for determining if a statutory scheme is in fact punitive provides for the rare case where a legislature has created what is really a criminal process but has denominated it civil. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *United States v. Ward*, 448 U.S. 242 (1980). Returning to those

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[25] It is worth noting that the remedy proposed by the Ninth Circuit for the federal system, *i.e.* using criminal forfeiture and combining it with the criminal prosecution in one action, will not necessarily work in the states. Many states do not have a criminal forfeiture procedure and cannot combine the civil forfeiture action with the criminal prosecution. Instead, those states will have to forego either the forfeiture action or the criminal prosecution if the analysis in the federal cases below is affirmed. Moreover in many states the civil forfeiture statutes require short time periods for adjudication after seizure. *E.g.*, Conn. Gen. Stat. § 54-36h(b) (1994) (forfeiture petition must be filed within 90 days of seizure and a hearing must be held promptly). Thus, it could often be the criminal prosecution which will be barred under the Sixth Circuit approach. That approach also provides an incentive for large scale criminal defendants to concede forfeiture cases quickly in order to avoid lengthy prison terms. *See People v. Hellis*, 536 N.W.2d 587, 592 (Mich. Ct. App.), *appeal denied*, 539 N.W.2d 504 (Mich. 1995).

principles will stem the tide of onerous, but meritless, double jeopardy litigation that *Halper* has unnecessarily created.

CONCLUSION

For the reasons set forth herein, the decisions of the Courts of Appeal for the Ninth and Sixth Circuits should be reversed.

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